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10 *Counsel for Indirect-Purchaser Plaintiffs*

11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN FRANCISCO DIVISION**

14
15 In re: CATHODE RAY TUBE (CRT)
16 ANTITRUST LITIGATION.

Master File No. 3:07-cv-5944 JST

MDL No. 1917

17 This Document Relates to:
18 All Indirect-Purchaser Actions.

**DECLARATION OF JACK I. GARVEY
IN SUPPORT OF LAW OFFICES OF
FRANCIS O. SCARPULLA'S
OBJECTION TO SPECIAL MASTER'S
REPORT & RECOMMENDATION RE
ALLOCATION OF IPP CLASS
COUNSEL ATTORNEYS' FEES**

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28 DECLARATION OF JACK I. GARVEY iso
LOFOS's OBJECTION TO SM's R&R RE
ALLOCATION OF IPP CLASS COUNSEL'S FEES

Master File No. 3:07-cv5944 JST
MDL 1917

1 I, Jack I. Garvey, hereby declare as follows:

2 1. I am an attorney licensed to practice before all the courts of the State of California,
3 and bear State Bar Number 63300. I am serving in this matter in the capacity of an expert in
4 contract law, having been retained by attorney Francis O. Scarpulla. If requested to by the Court, I
5 am prepared to testify as to all matters contained in this Declaration.

6 2. My current *curriculum vitae* is attached hereto as Exhibit A. I have been a
7 Professor of Law at the University of San Francisco School of Law for more than 40 years,
8 teaching contracts, international law, and arbitration. My writings on international dispute
9 resolution have been widely published. I have served as an expert consultant to law firms
10 concerning contracts, including particularly partnerships and joint venture contract issues.

11 3. In forming the opinions I set forth below, I have reviewed the declaration of
12 Francis O. Scarpulla filed in this matter October 5, 2016, and the exhibits attached thereto; Zelle
13 LLP's Response to Special Master's Request for Documents of October 10, 2016, and the exhibit
14 attached thereto; and a partial transcript of proceedings of October 3, 2016 before Special Master
15 Martin Quinn, pages 31 – 33. Before I reviewed any documents or pleadings that might be
16 covered by the Protective Order in this case, I read it and executed the required non-disclosure
17 agreement.

18 4. Based upon my review of the foregoing materials, and in particular the exhibit to
19 Zelle LLP's Response, it is my opinion that there was contract formation as to the basis for fees
20 constituted by the e-mail exchange.

21 5. The relevant principle of the common law of contract, embodied in California Civil
22 Code Section 1585, is the basic principle that there is agreement if offer and acceptance conform
23 in their material terms, and the acceptance is not conditional. There is no material variation
24 between the e-mails in that to "request" (Alioto's e-mail), or "be asked" (Corbitt's e-mail), does
25 not, as to either reference, constitute a condition of participation. Moreover, the only reasonable
26 interpretation of the understanding of both parties would be that allocation of costs would be
27

1 worked out on an equitable basis, which would not be expected to affect the agreement as to
2 allocation of fees, being a separate matter.

3
4 6. The Alioto proposition that “the same multiplier shall be applied to your time as is
5 applied to our time” was uncontested in the Corbitt response, and was the only stated basis for the
6 two firms working together on the same subject matter. This in itself should be sufficient to
7 constitute agreement on the formula for the respective payment of fees. Additionally, estoppel
8 would apply to preclude either party from denying “the same multiplier” was the basis for the
9 arrangement. Given mutual reliance by way of any subsequent substantial work, this would be so
10 – no matter what the substance of other terms beyond the joint agreement on lodestar multipliers.

11 7. Moreover, it is my opinion that the e-mail exchange establishing lodestar
12 multipliers was the memorialization of terms previously agreed. Irrespective of any arguable
13 uncertainty that the e-mail exchange in itself constituted an agreement that the fees were to be
14 based on “the same multiplier”, that term is established as the basis of the parties’ agreement to
15 work together by the exchange of e-mails representing a memorialization of previously agreed-
16 upon terms. In accordance with the common law principle reflected in Section 27 of the
17 Restatement of Contracts, a written exchange between the parties may be intended to record terms
18 earlier agreed, and is binding based on that earlier agreement irrespective of any incomplete nature
19 of that subsequent written recording of terms. The factors Section 27 mandates to consider are
20 substantially evident in the substance of the exchange of e-mails. Partial performance before the
21 subsequent writing is deemed to demonstrate agreement already achieved. The fact that Alioto’s
22 e-mail states his thanks for the retention of ApplEcon would alone establish sufficient partial
23 performance to demonstrate agreement was previously achieved, and this would be supplemented
24 by any conduct in their joint interest by either party prior to the e-mail exchange. Another factor
25 noted in Section 27 is the extent to which terms have been specified prior to the written exchange.
26 Judge Samuel Conti’s Order on representation, and any prior discussions (*e.g.*, “our discussion last
27 Friday”), as well as standard professional practice for such joint endeavors would additionally

1 supply the terms. The use of the past tense in Corbitt's e-mail, "We agreed" to run this case
 2 on a joint basis, and the statement of terms in Alioto's e-mail as already established, and Corbitt's
 3 language indicating earlier agreement ("Per our discussion last Friday and with your
 4 authorization"), also confirm the e-mail exchange as a memorialization of terms previously
 5 agreed.

6 8. Finally, it should be noted that estoppel applies whether the e-mail exchange
 7 constituted in itself an agreement as to "the same multiplier" or was simply a memorialization of
 8 agreement previously achieved. Given that the work proceeded without any objection by either
 9 party to the "the same multiplier" term, either party would be estopped to deny that term in light of
 10 the other party's reliance on "the same multiplier" as the sole stated basis for the arrangement as to
 11 fees.

12 9. In sum, whether the exchange of e-mails is viewed in reference to the standards for
 13 original contract formation, or the standards concerning memorialization of previous agreement, it
 14 is clear that the term stated by Alioto, that "the same multiplier shall be applied to your time as is
 15 applied to our time" was the governing and mutually binding material term of the agreement
 16 between the parties concerning the work for which the fees are now being contested.

17 10. As to Mr. Scarpulla's efforts to enforce that agreement as to his portion of the Zelle
 18 lodestar assigned to him, he is a third-party beneficiary of the TATP/Zelle agreement. See, e.g.
 19 *Goonewardene v. ADP*, 2016 DJDAR 11110.

20
 21 I declare under penalty of perjury under the laws of the State of California and the
 22 United States of America that the forgoing is true and correct and that this declaration was
 23 executed in San Francisco, California on November 9, 2016.
 24

25 
 26 Jack I. Garvey

EXHIBIT A

PROFESSOR JACK GARVEY - CURRICULUM VITAE

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EDUCATION:

1965-68, Harvard Law School, J.D.
1964-65, Oxford University, St. John's College, Oxford, England
1960-64, Harvard College, A.B. with honors

ACADEMIC AND PROFESSIONAL HISTORY

2014-2016: Fulbright Senior Specialist, teaching International Commercial Arbitration, Europe and Asia, US State Department assignment to Croatia for legal analysis of European Refugee Crisis

Since Fall 1976: Professor of Law, University of San Francisco:

Full-time teaching responsibilities: Contracts (40 years), Public International Law, International Civil Litigation and Mediation, International Arbitration, Negotiation of International Contracts

2016: Director, USF/Charles University Law Program, Prague, The Czech Republic

2012 and 2014: Director, USF/Ateneo Univ. Law Program, Manila, The Philippines

2013: Director, National University of Vietnam/USF Law Program, Hanoi, Vietnam

2010: Director, NLSIU/USF Law Program, Bangalore, India

2009: Director, Catholic Univ./USF International Law Program, Argentina

2007: Director, Duesto/USF International Law Program, Bilbao, Spain.

2003: Director, Pazmany University/USF Law Program, Budapest, Hungary

2002: Fulbright Senior Specialist, Brazil, Teaching International Arbitration Summer 2001: US State Dept. sponsored lectures at Hoi Chi Minh University, Vietnam, and in Hanoi at Ministry of Investment and Planning, on legal requirements to attract foreign trade and investment in implementation of US/Vietnam Trade Agreement.

April - June 1994, Sabbatical. Parker Fellowship, Teaching Public International Law and International Contract Dispute Resolution at University of Sidney Law School, Australia, and East China Institute of Law and Politics, Shanghai, China.

Since Fall 1973: Attorney, consultant and expert witness for numerous law firms on contracts and international and domestic contract related litigation, including particularly partnerships, joint ventures, leasing, franchising and insurance.

1987: Fellow, The Graduate Institute of International Studies, Geneva, Switzerland.

1988 - 1999: Trainer of Arbitrators for American Arbitration Association, contract disputes, particularly property leasing and construction, insurance, partnerships, franchising.

1983 - present: Arbitrator and Mediator: American Arbitration Association (contracts, business litigation).

1980-81: Visiting Scholar, Harvard Law School: research, writing and lectures on international contracts and international civil litigation.

June-Sept. 1983: Consultant to Government of Israel and U.N. agency "UNRWA".

Fall 1982: Lecturer on the "Problem of the Refugee," Institute of Public International Law and International Relations, Thessaloniki, Greece.

Summer 1995: Director, USF/Indonesia Summer Law Program, Bali, Indonesia

Summer 1991: Teaching International Contract Law at Charles University, Prague, The Czech Republic

Summer 1993, 1989 and 1979: Director, Trinity College, USF Law Program, Dublin, Ireland

1987: Lecturer and Director -- Legal Study Tour for Lawyers and Judges-- Soviet Union.

Summer 1985 and 1987: Teaching International Contract Law at University of San Diego Institute on International and Comparative Law, Paris, France.

Summer 1981: University of Warwick, England, teaching International Contract Law.

Fall 1971-73: Attorney, Graham & James, San Francisco. Concentration in contract work in international trade, international banking, international civil litigation, and international business planning.

1970-1971: U.S. Senate Staff, Special Assistant to Senator George McGovern. Presidential Campaign - legislative assistance, speechwriting, coordination of issue assistance on legislative issues from professional and academic communities

1968-70: Law Clerk to Federal Judge Hubert L. Will, Northern District of Illinois.

Research Assistant to Professor Abram Chayes during 1966-67 and 1967-68 Harvard Law School J.D. study and during summer 1967, at Stanford Law School, preparing international law casebook, International Legal Process, based on his tenure as The Legal Advisor, U.S. Dept. Of State

MEMBERSHIPS:

Admitted to California Bar: June 1972

Admitted to Illinois Bar: June 1969

American Arbitration Association

American Society of International Law

International Law Section, California Bar

PUBLISHED WRITINGS:

Book - 'Nuclear Counterproliferation; A New Grand Bargain, Oxford University Press (2013)'

Targeted Sanctions; Resolving the International Due Process Dilemma, Texas Journal of International Law, Fall, 2015.

To Fix the Nuclear Non-Proliferation Regime – Avoid State Classification, Florida Journal of International Law, Vol. XXI, No. 3, 371-401 (December 2009).

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United Nations Peacekeeping and Host State Consent, 64 American Journal of International Law 241 (1970).

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The United Nations Definition of Aggression: Law and Illusion in the Context of Collective Security, 17 Virginia Journal of International Law 177 (1977).

The Effect of the Law of the Sea Conference Upon the Process of the Formation of International Law, Comment in 1984 Proceedings of the Law of the Sea Institute, Hawaii.